NO. [redacted] 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

R. J. THOMAS,
Appellant

v.

H. W. COLLINS, SHERIFF OF TRAVIS COUNTY, TEXAS,
Appellee

Appeal from the Supreme Court of Texas

BRIEF FOR APPELLEE

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FIRM FOUNDATION—AUSTIN

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NO. 569

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BRIEF FOR APPELLEE

This brief is directed to the question of jurisdiction as well as to the merits in view of the Court's order on March 27, 1944, that "Further consideration of the question of the jurisdiction of this Court in this case is postponed to the hearing on the merits." We have undertaken to reply to the points on which appellant has announced he will rely as well as to

certain arguments made by appellant in the Court below, without waiting for a copy of his brief.

OPINION OF THE COURT BELOW

The opinion of the Supreme Court of Texas in this case is reported under the style of *Ex Parte Thomas*, 141 Tex. 591, 174 S. W. (2d) 958, and is copied in the record at pages 318-326.

STATEMENT OF THE CASE

This is an appeal from a judgment of the Supreme Court of Texas denying appellant's release on a writ of habeas corpus. The appellant is under sentence for contempt of a District Court of Texas for violating a restraining order enjoining him from soliciting members for a labor union in Texas without first procuring an organizer's card as required by Section 5 of Texas' 1943 Labor Regulatory Law. (Article 5154a, Vernon's Annotated Texas Civil Statutes).

The Supreme Court of Texas in its opinion states the case as follows:

> "The State filed suit in the trial court, alleging that the relator was a labor organizer within the meaning of the Act, who for pecuniary or financial consideration was engaged in soliciting members for a certain labor union; that he had not previously applied to nor obtained from the Secretary of State an organizer's card, as provided for in Section 5 of the Act; and that he was threatening to and would violate the pro-

visions of said Section 5 of the above Act by soliciting members for said labor union in Texas, unless he was restrained from so doing. The trial court issued a temporary restraining order and caused notice thereof to be served on the relator. Thereafter the relator, who was a paid representative of the union, violated the terms of the injunction by soliciting members for said union without having first registered with the Secretary of State as provided for in said Section 5. After a hearing he was adjudged to be in contempt of court and his punishment fixed at a fine of $100 and confinement in jail for three days. There is no question as to the sufficiency of the pleadings or the regularity of the proceedings in the contempt action, nor is there any contention that the facts were insufficient to show a violation of Section 5 of the Act. Relator's counsel in his argument before this court conceded the existence of the necessary factual basis for the judgment in the contempt proceedings."

The sentence imposed by the District Court was the maximum punishment permitted by Texas Statutes.[1] The appellant Thomas filed an application for a writ of habeas corpus with the Supreme Court of Texas, which was granted and the appellant was released on bond. Upon the hearing on the writ, the Supreme Court of Texas, denied the petition for discharge and remanded appellant to the custody of ap-

[1] Art. 1911, R. S. of Texas, 1925, reads as follows: "The District Court may punish any person guilty of contempt of such court by fine not exceeding $100 and by imprisonment not exceeding three days."

pellee "in order that the judgment of the District Court may be enforced."

SUMMARY OF THE ARGUMENT

Counter Point No. 1

Section 5 of Article 5154a, Vernon's Annotated Texas Civil Statutes, as construed by the Supreme Court of Texas is a registration statute applicable only to those persons engaged in the occupation or business of labor organizing and on the basis of this construction no constitutional question is involved.

Olsen v. Nebraska, 313 U. . 236
California v. Thompson, 313 U. S. 109
Selmer v. Oregon State Board of Dental Examiners, 294 U. S. 608
People of the State of New York, ex rel Bryant v. Zimmerman, 278 U. S. 63
Clark v. Paul Gray, Inc., 306 U. S. 583
Hendrick v. Maryland, 235 U. S. 610.

1-a. The statute as enacted and as applied does not abridge freedom of speech.

Carpenters & Joiners Union v. Ritter's Cafe, 315 U. S. 722
Cox v. New Hampshire, 312 U. S. 569
City of Manchester v. Leiby, (1 cir.) 117 Fed. (2) 661, certiorari denied, 313 U. S. 562
Cantwell v. Connecticut, 310 U. S. 296, 304, 306
Chaplinsky v. New Hampshire, 315 U. S. 568
Valentine v. Chrestensen, 316 U. S. 52

Prince v. Commonwealth of Massachusetts, 88 L. Ed. (Adv. Sheets) 403
Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U. S. 287.

1-*b*. The statute as enacted and as applied does not deny appellant equal protection of the laws.

People of the State of New York, ex rel Bryant v. Zimmerman, 278 U. S. 63
Lindsley v. National Carbonic Gas Co., 220 U. S. 61
Tigner v. Texas, 310 U S. 141
Williams v. Arkansas, 217 U. S. 79
Semler v. Oregon State Board of Dental Examiners, 294 U. S. 608, 610
Watson v. Maryland, 218 U. S. 173, 178

1-*c*. The statute as enacted and as applied does not impose an undue burden on interstate commerce.

California v. Thompson, 313 U. S. 109
Hendrick v. Maryland, 235 U. S. 610, 622-624

1-*d*. The statute as enacted and as applied does not cover a field which is pre-empted by Federal laws.

Allen-Bradley Local v. Wisconsin Empoyment Rel. Bd. 315 U. S. 740.
Terminal Railroad Ass'n of St. Louis v. Brotherhood of Railroad Trainmen, 318 U. S. 1

Counter-Point No. 2

Section 4a of the Texas Law, which denies aliens

and felons the right to serve as labor organizers as defined in the Act, is severable under Section 15 from the remainder of the Act, and the decision of the Supreme Court of Texas on the question of severability is conclusive on this court.

Dorchy v. Kansas, 264 U. S. 286
Truax v. Corrigan, 257 U. S. 312, 341-342
Allen-Bradley Local v. Wisconsin Employment Relations Bd. 315 U. S. 740, 747, 748
Howat v. Kansas, 258 U. S. 181
Hendrick v. Maryland, 235 U. S. 610, 621

Counter-Point No. 3

Section 4a of the Texas Act, which denies to aliens and felons the right to serve as labor organizers as defined in the Act, is constitutional.

Terrace v. Thompson, 263 U. S. 197
Crane v. New York, 239 U. S. 195
Porterfield v. Webb, 263 U. S. 225
Ohio ex rel Clarke v. Deckebach, 274 U. S. 392
Trageser v. Gray, 73 Md. 250, 20 A. 905, 9 L. R. A. 780, 25 Am. St. Rep. 587
Commonwealth v. Hana, 195 Mass. 262, 81 N. E. 149 11 L. R. A. (N.S.) 799

ARGUMENT

Counter Point 1

Section 5 of Article 5154a, Vernon's Annotated

Texas Civil Statutes, as construed by the Supreme Court of Texas is a registration statute applicable only to those persons engaged in the occupation or business of labor organizing and on the basis of this construction no constitutional question is involved.

The Attorney General of Texas appears in this case on behalf of appellee pursuant to Section 13[1] of the Act in controversy. The Attorney General filed the original suit for injunction against appellant and represented the State in obtaining the judgment against appellant for contempt of court. R. 291, 295.

The judgment for contempt was rendered on September 25, 1943, by a District Court of Travis County, Texas, a constitutional court of general jurisdiction (Sec. 8, Article 5, Texas Constitution) pursuant to jurisdiction expressly conferred by Section 12[2] of the Act in controversy.

Section 5 of the Act in controversy provides:

> "All labor union organizers operating in the State of Texas shall be required to file with

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[1]Section 13 of Art. 5154a, V.A.T.C.S. is as follows:
"It is hereby made the duty of the Attorney General and the District Attorneys and County Attorneys of this State, within their respective jurisdictions to prosecute any and all criminal proceedings and to institute and maintain any and all civil proceedings herein authorized for the enforcement of this Act."

[2]Section 12 reads as follows:
"The District Courts of this State and the judges thereof shall have full power, authority and jurisdiction, upon

the Secretary of State, before soliciting any members for his organization, a written request by United States mail, or shall apply in person for an organizer's card, stating (a) his name in full (b) his labor union affiliations, if any; (c) describing his credentials and attaching thereto a copy thereof, which application shall be signed by him. Upon such applications being filed, the Secretary of State shall issue to the applicant a card on which shall appear the following: (1) the applicant's name; (2) his union affiliation; (3) a space for his personal signature; (4) a designation, 'labor organizer'; and (5) the signature of the Secretary of State, dated and attested by his seal of office. Such organizer shall at all times, when soliciting members, carry such card, and shall exhibit the same when requested to do so by a person being so solicited for membership."

The statute does not make any provision for the expiration or cancellation of organizers' cards after they have been issued.

Section 2-(c) provides: "'Labor organizer' shall mean any person who for a pecuniary or financial consideration solicits memberships in a labor union or members for a labor union."

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the application of the State of Texas, acting through an enforcement officer herein authorized, to issue any and all proper restraining orders, temporary or permanent injunctions, and any other and further writs or processes appropriate to carry out and enforce the provisions of this Act. Such proceedings shall be instituted, prosecuted, tried and heard as other civil proceedings of like nature in said courts."

Our view of this case is—first, that this appeal involves only Sections 5 and 2 (c) of the Act as quoted above; that Section 2 (c) defines an occupation or business (paid labor organizer) which may be subjected to reasonable regulations under the State's police power and that Section 5 as construed by the Supreme Court of Texas is a reasonable regulation and second, that Section 5 is a reasonable regulation and would be valid even without Section 2 (c).

The Supreme Court of Texas in its opinion construed these sections as follows:

> " . . . It affects only the right of one to engage in the business as a paid organizer, and not the mere right of an individual to express his views on the merits of the union. Furthermore, it will be noted that the Act does not require a paid organizer to secure a license, but merely requires him to register and identify himself and the union for which he proposes to operate before being permitted to solicit members for such union. The Act confers no unbridled discretion on the Secretary of State to grant or withhold a registration card at his will, but makes it his mandatory duty to accept the registration and issue the card to all who come within the provisions of the Act upon their good-faith compliance therewith. . . . "

The Texas Supreme Court drew an analogy between paid labor organizers and other businesses, occupations or professions by saying:

"Many statutes have been enacted in this State which curtail or limit the right of one to operate or speak as the agent of another. For example: 'The Securities Act' (Art. 600a, Vernon's Civil Statutes) prohibits an agent from selling securities for another without a permit from the Secretary of State. Insurance agents are required to secure licenses before being permitted to sell insurance. Art. 5662a, Vernon's Civil Statutes. Railway agents are required to have a certificate of authority before being permitted to sell railway tickets. Art. 6415, Rev. Civ. Stat. 1925. A real estate broker is required to have a license before he may act as the agent for another. Art. 6573a, Vernon's Civil Statutes. Likewise, Congress has enacted a statute which requires agents of foreign governments to register with the Secretary of State before being permitted to so act. 22 U.S.C.A. Sec. 601. Numerous other illustrations could be given. None of these statutes have been held unconstitutional on the ground that they abridged the right of free speech or otherwise unnecessarily deprived a person of his liberty.[1]"

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[1]For other illustrations, see:

Attorneys are required to obtain licenses from the Supreme Court and to register annually with the court before they can practice law. Article 306, V.A.T.C.S.

Physicians must not only have a license but they must register annually with the Texas State Board of Medical Examiners. Article 4498a and 4504, V.A.T.C.S.

Pharmacist must be registered with the State Board of Pharmacy. Article 755, V.A.T.P.C.

Engineers must register with a State Board of Registration for Professional Engineers. Article 3271a, V.A.T.C.S.

Architects must register with the State Board of Architectural Examiners. Article 249a, V.A.T.C.S.

The Texas Supreme Court gave its version of the facts reasonably supporting the enactment of Section 5 of Article 5154a in the following language:

"That the Legislature was justified in concluding that the part of the Act here under con-

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Land Surveyors must secure a license from the State Board of Examiners of Land Surveyors. Article 5271, V.A.T.C.S.

Veterinarians must not only have an annual license but they must register in the District Clerk's Office of the County in which they reside. Articles 7451 and 7461, V. A.T.C.S.

Midwives and Undertakers "or persons acting as such" must register with the district registrar of the State Department of Health. Article 4477, Rule 49a, V.A.T.C.S.

Dentists must have a license from the State Board of Dental Examiners. Article 4544 V.A.T.C.S.

Embalmers who are engaged in the business of embalming must have a license from the State Board of Embalming. Article 4578, V.A.T.C.S.

Chiropodists must register annually with the State Board of Chiropody Examiners. Article 4571, V.A.T.C.S.

Optometrists must secure a license from the Texas State Board of Examiners in Optometry and must register with the County Clerk of their County. Articles 4557 and 4561, R.C.S. of T. 1925.

Chiropractors are required to secure an annual license from the Texas Board of Chiropractic Examiners. Article 4512a, V A.T.C.S.

Cosmetologists must register with and obtain a license from the State Board of Hairdressers and Cosmetologists. Article 734b, V.A.T.P.C.

Butchers must register with the County Clerk "before engaging in the business of slaughter and sale of animals for market." Article 1450, R. Cr. S. of T. 1925.[1]

sideration was necessary for the protection of the general welfare of the public, and particularly the laboring class, can hardly be doubted. As previously stated, membership in labor unions runs into millions. Not infrequently thousands of employees work at a single plant. It is impossible for them to know each other, or to know

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Funeral Directors must register and obtain a license from the State Board of Embalming. Article 4582a, V.A.T.C.S.

Druggist or Pharmacist operating a drug store or pharmacy must obtain a permit from the State Board of Pharmacy. Article 4245a, Sec. 17, V.A.T.C.S.

Pawnbrokers must file a bond with the County Clerk of the county in which they do business. Article 6147, R.C.S. of T. 1925.

Commercial College Operators must first obtain a permit from the Secretary of State. Article 1415a, V.A.T.C.S. and Article 301a, V.A.T.P.C.

Loan Brokers are required to register with the County Clerk and file a bond with the County Judge of the county in which they engage in business. Article 6165a, V.A.T.C.S.

Industrial Workers manufacturing articles or materials at home must have a permit from the State Board of Health. Article 782a, V.A.T.C.S.

Live Stock Commission Merchants must file a bond with the County Judge of the County in which they are engaged in business. Article 1287a, V.A.T.C.S.

Chain System Merchants are required to obtain a license from the County Tax Collector of the county in which such business is to be conducted. Article 7429, V.A.T.C.S.

Any person acting as principal or agent for another, for the purpose of drilling, owning or operating any oil or gas well or owning or controlling leases of oil and mineral rights or the transportation of oil or gas by pipe line must register with the Railroad Commission of Texas and give certain information concerning his principal. Article 6035, R.C.S. of T., 1925.

those who purport to represent the various unions. When a laborer is approached by an alleged organizer it is impossible for him to know whether he is an impostor or whether he has authority to represent the union which he purports to represent. Thus a great field for the perpetration of fraud both as against the laborer and

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Barber and Beauty Operators cannot engage in business without a license. Articles 734a and 734b, V.A.T.P.C.

Persons Operating Day Nursery, whether for charity or revenue "shall obtain an annual license from the State Board of Health, which license shall be issued without fee." Article 4442a, V.A.T.C.S.

Operators and Chauffeurs of motor vehicles must have a license. Articles 6687a, V.A.T.C.S.

Public Warehousemen must register with and secure a certificate from the County Clerk of the county in which their warehouses are situated. Article 5569, V.A.T.C.S.

Citrus Fruit Dealers must procure a license from the Commissioner of Agriculture. Article 118b, V.A.T.C.S.

Wholesalers of Oleomargarine are required to register with the State Comptoller, giving their names and addresses and the names of their principal. Article 7057c, V.A.T.C.S.

Public Weighers must have a certificate of authority from the Commissioner of Agriculture. Article 5690, V.A.T.C.S.

Cotton Ginners must have a license from the Commissioner of Agriculture. Article 5674, V.A.T.C.S.

Public Cotton Classers must have a license issued by the Secretary of Agriculture of the United States. Article 5679a, V.A.T.C.S.

Brewers, Distillers, wholesalers or retailers of liquor or wine must obtain a permit from the State Liquor Control Board. Article 666-15, V.A.T.P.C.

Employment or Labor Agencies must obtain a license from the Commissioner of the Bureau of Labor Statistics. Article 5221a-4, V.A.T.C.S.

the union is presented. It is important to the laborer that he be able to know that the representations of the purported organizer who approaches him with a request that he join the union and pay his dues in order to be able to work on a particular job are the representations of an accredited agent of the union and that the purported representative be identified in order that pretenders under the guise of authority from the

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Auctioneers are required to pay an annual occupation tax. Article 7044 (6) V.A.T.C.S.

Commercial Fishermen and fish dealers must each have a license from the Game, Fish and Oyster Commission before they can engage in their business. Article 934a, V.A.T.P.C.

A "Contracting Stevedore" must have a license from the County Clerk before he can pursue said occupation. Article 5194, R.C.S. of T., 1925.

Commission Merchant, Dealer, Broker or Agent, as defined in the Texas Agriculture Protective Act can not act as such without procuring a license from the Commissioner of Agriculture. Article 1287-1, V.A.T.C.S.

Oil Well Drillers must procure a permit from the Railroad Commission before they can drill an oil well in Texas. Rule 37 of the Texas Railroad Commisssion under authority of Article 6029, V.A.T.C.S.

Hawkers, Peddlers, Pawnbrokers, Draymen, Drivers of baggage wagons, Porters, and "all others pursuing like occupations" may be licensed by cities, town and villages. Article 1015, R. S. of T. 1925.

Candidates of political parties for nomination for State office in primary elections must file with the Secretary of State detailed statements of receipts and expenditures. Article 269, V.A.T.C.S.

Deaths and Births of persons—It is necessary to obtain a certificate from the State Department of Health when a person is born and a permit when a person is buried in Texas. Rules 38a and 46a of Article 4477, V.A.T.C.S.

union may not misrepresent the organization, nor collect and squander funds intended for its use. The law is for the protection of both the laborer and the union."

That portion of the Act here in issue was enacted in recognition of the fact that something more is done by a labor organizer than talking. He acts for an alleged principal and collects money for the principal, or if he does not actually collect fees and dues in person, he makes it possible for his principal to collect them. He purports to act for a labor union in establishing a contractual relation between the person solicited and the labor union he claims to represent. In limiting the Act to persons "who for a pecuniary or financial consideration solicits" for a labor union the legislature has defined a business or profession which is clearly subject to reasonable regulations under the State's police power.

There is no question but that paid union labor organizers are engaged in a business "affected with a public interest" in the sense in which this term was previously used to justify State regulation of an occupation or business. This Honorable Court has said that "the merest glance at State and Federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern." *Thornhill* v. *Alabama*, 310 U. S. at p. 103. Under recent decisions, however, this word formula has been discarded as a measure of the State's police power. In *Olsen* v. *Nebraska*, 313 U. S. 236, this Honorable Court held that a Ne-

braska statute licensing private employment agencies and fixing their maximum fees was constitutional. In reference to businesses affected with a public interest, this Court said:

> "It was said to be so affected if it had been 'devoted to the public use' and if 'an interest in effect' had been granted 'to the public in that use.' Ribnik v. McBride, supra (277 U. S. 355, 72 L. Ed. 915, 48 S. Ct. 545, 56 A.L.R. 1327). That test, labelled by Mr. Justice Holmes in his dissent in the Tyson case (273 U. S. at p. 446, 71 L. Ed. 729, 47 S. Ct. 426, 58 S. Ct. 1236) as 'little more than a fiction,' was discarded in Nebia v. New York, supra (291 U. S. pp. 531-539, 78 L. Ed. 953, 958, 54 S. Ct. 505, 89 A.L.R. 1469). It was there stated that such criteria 'are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices,' and that the phrase 'affected with a public interest' can mean 'no more than that an industry, for adequate reason, is subject to control for the public good.' (Id. 291 U. S. p. 536, 78 L. Ed. 956, 54 S. Ct. 505, 89 A.L.R. 1469). And see the dissenting opinion in Ribnik v. McBride, supra (277 U. S. at p. 359, 72 L. Ed. 916, 48 S. Ct. 545, 56 A.L.R. 1327)."

In reference to the necessity for such legislation this court said:

> "We are not concerned, however, with the wisdom, need, or appropriateness of the legisla-

> tion. Differences of opinion on that score suggest a choice which 'should be left where . . . it was left by the Constitution—to the States and Congress.' Ribnik v. McBride, supra, at p. 375, dissenting opinion. There is no necessity for the State to demonstrate before us that evils persist despite the competition which attends the bargaining in this field. In final analysis, the only constitutional prohibitions or restraints which respondents have suggested for the invalidation of this legislation are those notions of public policy embedded in earlier decisions of this Court but which as Mr. Justice Holmes long admonished, should not be read into the Constitution. Tyson & Brother v. Banton, supra, at p. 446; Adkins v. Children's Hospital, supra, at p. 570. Since they do not find expression in the Constitution, we cannot give them continuing vitality as standards by which the constitutionality of the economic and social programs of the States is to be determined."

In *California* v. *Thompson*, 313 U.S. 109, a California statute which defined "a transportation agent as one who sells or offers to sell or negotiate for transportation over the public highways of the State" and which required "every agent to procure a license from the State Railroad Commission authorizing him so to act," was held to be constitutional.

In *Semler* v. *Oregon State Board of Dental Examiners*, 294 U. S. 608, an Oregon statute prohibiting dentists from advertising or "employing or making use of advertising solicitors" was held to be a constitutional exercise of the State's police power.

These cases all deal with extreme instances of State regulation. That portion of the Texas statute involved here merely requires the person affected to register and disclose the identiy of himself and his principal. Where, as here, the regulation involves no more than a filing of identification papers with the Secretary of State, there can be no question of the State's power. People of the State of New York ex rel *Bryant* v. *Zimmermann*, 278 U. S. 63. In that case a New York statute with certain exceptions required that "every existing membership corporation, and every existing unincorporated association having a membership of twenty or more persons, which corporation or association requires an oath as a prerequisite or condition of membership . . shall file with the Secretary of State a sworn copy of its constitution, by-laws, rules, regulations and oath of membership, together with a roster of its membership and a list of its officers for the current year." The statute also made it a misdemeanor for a person to become or remain a member or attend a meeting of such a corporation or association with knowledge that it had failed to comply with the regulation above quoted. In upholding the validity of this statute against attacks on its constitutionality such as those involved here, this Honorable Court said:

> "The relator's contention under the due process clause is that the statute deprives him of liberty in that it prevents him from exercising his right of membership in the association. But his liberty in this regard, like most other personal

rights, must yield to the rightful exertion of the police power. There can be no doubt that under that power the State may prescribe and apply to associations having an oath-bound membership any reasonable regulation calculated to confine their purposes and activities within limits which are consistent with the rights of others and the public welfare. The requirement in Sec. 53 that each association shall file with the Secretary of State a sworn copy of its constitution, oath of membership, etc., with a list of members and officers is such a regulation. It proceeds on the two-fold theory that the State within whose territory and under whose protection the association exists is entitled to be informed of its nature and purpose, of whom it is composed and by whom its activities are conducted, and that requiring this information to be supplied for the public files will operate as an effective or substantial deterrent from the violations of public and private right to which the association might be tempted if such a disclosure were not required. The requirement is not arbitrary or oppressive, but reasonable and likely to be of real effect. Of course, power to require the disclosure includes authority to prevent individual members of an association which has failed to comply from attending meetings or retaining membership with knowledge of its default. We conclude that the due process clause is not violated."

Our alternative position is that Section 5 would be a constitutional regulation even though it applied to all labor union organizers, the voluntary as well as the paid organizers. The question here is not unlike that involved in State statutes regulating cer-

tain phases of interstate commerce. For instance, a State law which requires non-resident motorists to secure a certificate of registration from the Commissioner of Motor Vehicles before they are entitled to use the public highways of the State, is a constitutional regulation. *Hendrick* v. *Maryland*, 235 U. S. 610. Also, the California Caravan Act of 1937, which required all persons, driving an automobile into the State for the purpose of sale either on its own power or in tow of another automobile, to obtain a six months' permit at a cost of $15.00 for each car, was held not to be an undue burden on interstate commerce. *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583. A still stronger case is *California* v. *Thompson*, 313 U. S. 109, where a California statute defining a transportation agent as "one who sells or offers to sell or negotiate for" transportation over the public highways of the State and requiring each such agent to procure a license from and file a bond with the State Railroad Commission, was held to be constitutional even "when applied to one who negotiates for the transportation interstate of passengers over the public highways of the State" The analogy is that interstate commerce like freedom of religion, speech and press is protected from undue burdens imposed by the States, yet the States still have authority to impose regulations which are reasonable in relation to the subject.

1-a. The statute as enacted and as applied does not abridge freedom of speech.

Since the decision of this Honorable Court in *Car-*

penters and Joiners Union v. *Ritters Cafe*, 315 U. S. 722 it has been settled that the freedom of speech even of a labor union and its agents is not "completely inviolable." The limitation on free utterance there (peaceful picketing) was imposed by a Texas Court by means of an injunction, but in gauging an infringement of the guaranties announced in the First Amendment, which are made applicable to the States through the Fourteenth Amendment, a State court would have no priority over a State Legislature. *Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 312 U. S. 287, 297.

The Supreme Court of Texas in the present case further held that:

> "In our opinion, the Act imposes no previous general restraint upon the right of free speech. It does not impose a general restraint on the right to solicit others to join the union, nor does it vest unlimited discretionary power in the Secretary of State to grant or refuse a registration card to any one qualified under the Act to solicit members for the unions. It merely requires paid organizers to register with the Secretary of State before beginning to operate as such."

The construction of a State statute by the highest court of the State is binding on this Honorable Court. *Prince* v. *Commonwealth of Massachusetts*, 88 L. Ed. (Adv. Sheets) at p. 406.

It will be noted that Section 5 imposes no tax. The organizer's cards are issued without cost to any labor

organizer who comes within and who complies with the terms of the statute. Therefore the cases of *Grosjean* v. *American Press Co.*, 297 U. S. 233; *Jones* v. *Opelika*, 319 U. S. 103; *Murdock* v. *Pennsylvania*, 319 U. S. 105 and *Follett* v. *Town of McCormick, S. C.* (opinion delivered March 27, 1944) and similar tax cases are not in point.

Under the construction given this section of the Act by the Supreme Court of Texas there is no question of censorship or previous restraint involved. Therefore the cases of *Lovell* v. *City of Griffin*, 303 U. S. 444; *Hague* v. *Committee for Industrial Organizations*, 307 U. S. 496; *Near* v. *Minnesota*, 283 U. S. 697; *Schneider* v. *State of New Jersey, Town of Irving*, 308 U.S. 147; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Thornhill* v. *Alabama*, 310 U. S. 88; *Martin* v. *Struthers*, 319 U. S. 141, and similar cases involving either a censorship or a previous restraint that "limits the dissemination of knowledge" are not in point. Section 5 of the Act in controversy as construed by the highest court in Texas is regulatory and not prohibitory and in this respect is in the same class as the regulations whose constitutionality were upheld in *City of Manchester* v. *Leiby*, (1 cir.) 117 Fed. (2) 661, certiorari denied: 313 U. S. 562 and *Cox* v. *New Hampshire*, 312 U. S. 569.

In addition to the construction by the Supreme Court of Texas that this statute conferred ministerial and not discretionary powers on the Texas Secretary of State, the Secretary as a witness in the trial court testified that 223 cards had already been is-

sued to labor organizers who had applied therefor. R. 14. He also testified that applications had been returned to various persons who had failed to properly fill out the form and thereby comply with the statute but that no applications had been denied. R. 14.

A printed form of the application issued for the use of applicants by the Secretary of State and the Policies of the State Department are set out on pages 46, 47, 72-75 of the Record.

There is no evidence that Section 5 of the statute has been or ever will be used as an excuse to prevent the free dissemination of ideas by labor union organizers in Texas. It is a registration statute and nothing more. We see no reason why a labor organizer, like Mr. Thomas, more than any other bona fide sales agent, should object to identifying himself and his principal when he enters Texas to conduct his business.

The appellant will contend that a labor union is "a voluntary, unincorporated association not organized for profit."[1] The absence of a "profit motive" is urged as a basis for protecting labor unions in the exercise of "the freedom of speech" in the same way as Jehovah's Witnesses are protected in the "free exercise of religion." *Murdock* v. *Pennsylvania*, supra; *Follett* v. *Town of McCormick, S. C.* supra. How-

[1] See Valentine v. Chrestensen, 316 U. S. 52, holding that where motives are mixed the Court will not undertake to classify the activity as non-commercial.

ever, there is a fundamental difference between the "free exercise of religion" as practiced by Jehovah's Witnesses and "freedom of speech" as enjoyed by labor organizers. The "Witnesses" engage in door to door canvassing and solicitations as a religious rite. "This form of evangelism is utilized today on a large scale by various religious sects whose colporteurs carry this Gospel to thousands upon thousands of homes and seek through personal visitation to win adherents to their faith. It is more than preaching; it is more than distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting. This form of religious activity occupies the same high estate under the First Amendments as do worship in churches and preaching from pulpits." *Murdock* v. *Pennsylvania*, 319 U. S. pp. 108, 109. The tax ordinance in the Murdock case was a burden upon the exercise of religion itself and because of the relationship between the tax and the subject matter, it was held in effect that the tax was an undue burden and violated the guaranty of "the free exercise of religion."

The labor organizer, on the other hand, enjoys freedom of speech as an incident to other activities. It is not with him an end but rather a means to an end. The appellant is not a "witness" for the C.I.O. in the same sense as the others are "Witnesses" for Jehovah. It may be true that labor unions do not declare dividends and have no invested capital on which they expect a six percent return. But the objectives of the union are primarily economic. Lack of a cor-

porate form cannot serve to make their activities fraternal and philantropic as distinguished from commercial. The union like the employer is an industrial combatant whose right "to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist." *Thornhill* v. *Alabama*, 310 U. S. 88, 103, 104. When a labor union undertakes to solicit new members through a labor organizer, whether paid or voluntary, it is engaging in a business activity which has no higher purpose than the strengthening of its own economic power through which its members hope to realize larger pay checks and better working conditions for themselves. The union, of course, speaks only through its agents but these agents cannot claim immunity from regulation when the business which they serve is itself subject to regulation. *People of the State of New York ex rel Bryant* v. *Zimmerman*, 278 U. S. 63. When, however, an organizer solicits "for a pecuniary or financial consideration," he thereby engages in a business or profession in his own right and is subject to reasonable State regulations without reference to the nature of the activity in which his principal is engaged.

It is our view that Section 5 of the Act in controversy would be valid even if it applied to Jehovah's Witnesses. *Cox* v. *New Hampshire*, 312 U. S. 569; *City of Manchester* v. *Leiby*, (1 cir.) 117 Fed. (2) 661, certiorari denied; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568; *Cantwell* v. *Connecticut*, 310 U. S. 296, 304, 306. In the last mentioned case this Hon-

orable Court said:

> "Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public. Certainly penal laws are available to punish such conduct. Even the exercise of religon may not be at some slight inconvenience in order that the State may protect its citizens from injury. Without doubt a State may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent."

We mention the difference in labor organizers and and Jehovah's Witnesses only in reply to appellant's argument.

1-b. The statute as enacted and as applied does not deny appellant equal protection of the laws.

The only question under the equal protection of the law provision is whether or not the classification of paid labor organizers has a reasonable basis in fact and is not arbitrary.

The due process clause of the Fourteenth Amendment admits of the exercise of a wide scope of discretion in regard to the State's power to classify in the adoption of police laws and "one who assails the classification in such a law must carry the burden of showing it does not rest upon any reasonable basis.

but is essentially arbitrary." "If any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed." *Lindsley* v. *National Carbonic Gas Co.*, 220 U. S. 61, 78, 83.

This court has held that a New York law similar to the Act involved here, which applied to the Ku Klux Klan, "a voluntary unincorporated association not organized for profit" and not to labor unions, was constitutional. People of the State of *New York ex rel Bryant* v. *Zimmerman*, 278 U. S. 63.

This court has more recently held that the Texas anti-trust law, which excludes combinations of farmers and stockmen and includes all others, was constitutional. *Tigner* v. *Texas*, 310 U. S. 141.

In *Williams* v. *Arkansas*, 217 U. S. 79, it was held that a state statute forbidding drumming or soliciting on trains for any "hotels, lodging houses, eating houses, bath houses, physicians, masseurs, surgeons or other medical practitioners," was not unconstitutional because it did not apply to the "commercial drummer."

In *Semler* v. *Oregon State Board of Dental Examiners*, 294 U. S. 608, 610, it was held that a State statute prohibiting dentists from advertising or "employing or making use of advertising-solicitors" was not unconstitutional because it was limited to dentists and did not extend to other professional classes.

In *Watson* v. *Maryland*, 218 U. S. 173, 178, it was held that a registration statute for physicians was not unconstitutional because it applied only to paid physicians and not those engaged in "gratuitous services."

1-c. The statute as enacted and as applied does not impose an undue burden on interstate commerce.

The appellant further challenges that part of the Texas statute in controversy as creating an undue burden on interstate commerce. This contention is, of course, an implied admission that appellant and his principal are engaged in business which operates by means of interstate transactions, for otherwise there would be nothing on which the State regulation could impose a burden. However, this point, in our opinion, is too far-fetched to require argument. *California* v. *Thompson*, 313 U. S. 109. *Hendrick* v. *Maryland*, 235 U. S. 610, 622-624.

1-d. The statute as enacted and as applied does not cover a field which is pre-empted by Federal Laws.

The appellant further contends that the Federal Government has by the passage of the Railroad Labor Act and the National Labor Relations Act and other laws pre-empted the field covered by Article 5154a, Vernon's Annotated Texas Civil Statutes, to such an extent that a registration provision such as Section 5 is rendered inoperative. Similar contentions were overruled in *Allen-Bradley Local* v. *Wis-*

consin Employment Relations Board, 315 U. S. 740, 748-751, and *Terminal Ry. Association of St. L.* v. *Brotherhood of R. R. Traimen*, 318 U. S. 1.

Counter Point No. 2

Section 4a of the Texas law, which denies aliens and felons the right to serve as labor organizers as defined in the Act, is severable under Section 15 from the remainder of the Act, and the decision of the Supreme Court of Texas on the question of severability is conclusive on this court.

In the Supreme Court appellant made the same contentions with reference to invalidity of Section 4a[1] and its consequent effect on the validity of Section 5, as are being urged here. R. 313. The Supreme Court of Texas did not in its opinion mention Section 4a but it did copy Section 15, the severability clause of the Act and held Section 5 to be constitutional. The effect of its holding was to overrule appellant's contention and hold that Section 4a, even though invalid, was severable from Section 5 and did not affect its validity. This construction by the highest court of a State of its own laws is binding on this Honorable Court.

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[1]Section 4a, Article 5154a, V.A.T.C.S reads: "It shall be unlawful for any alien or any person convicted of a felony charge to serve as an officer or official of a labor union or as a labor organizer as defined in this Act. This section shall not apply to a person who may have been convicted of a felony and whose rights of citizenship shall have been fully restored."

In *Dorchy* v. *Kansas*, 264 U. S. 287, 290 this Court said:

> "The task of determining the intention of the state legislature in this respect, like the usual function of interpreting a state statute, rests primarily upon the state court. Its decision as to the severability of a provision is conclusive upon this Court. Gatewood v. North Carolina, 203 U. S. 531, 543; Guinn v. United States, 238 U. S. 347, 366; Schneider Granite Co. v. Gast Realty Co., 245 U. S. 388, 290."

See, also, the recent holding in *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U. S. 740, 747, 748 which involved the constitutionality of only a part of the *Wisconsin Employment Peace Act, and Truax* v. *Corrigan*, 257 U. S. 312, 341-342.

In an opinion rendered before the present case arose the Attorney General of Texas ruled that Section 4, 7 and 10a of the law in controversy were unconstitutional, but that these sections were severable and did not affect the validity of the balance of the Act. R. 78.

It is true that if Section 4a is held to be unconstitutional, aliens and felons may become labor organizers and will be eligible to apply for an organizer's card under Section 5 of the Act. But there is no question about the legislative intent in such a contingency. The Legislature has declared in Section 15 that "such invalidity shall not affect the remaining portions thereof, it being the express intention

of the Legislature to enact such act without respect to such section or part so held to be invalid" There is every reason for giving effect to this language if the invalid portion is Section 4a, because the purpose to be served by a registration statute would apply more strongly in the case of aliens and felons than with paid labor organizers who have the privileges and responsibilities of citizenship.

Furthermore, appellant Thomas testified that he was born in Ohio (R. 22) and he has not shown that he is hurt in any way by the prohibition against aliens and felons. Only those whose rights are directly affected can properly question the constitutionality of a state statute and invoke the jurisdiction of this court in regard thereto. *Hendrick* v. *Maryland*, 235 U. S. 610, 621. In an appeal from a State court denying appellant's release on a writ of habeas corpus from a judgment for contempt, this court will dismiss the appeal if there is any ground on which the contempt judgment may be sustained. *Howat* v. *Kansas*, 258 U. S. 181.

Counter Point No. 3

Section 4a of the Texas Act which denies to aliens and felons the right to serve as labor organizers as defined in the Act, is constitutional.

Although a statute which arbitrarily forbids aliens to engage in ordinary kinds of business to earn their living would be unconstitutional, *Yick Wo.* v. *Hopkins*, 118 U. S. 356; *Truax* v. *Raich*, 239

U. S. 33, the State in the exercise of its police power may limit to its citizens and deny to aliens and felons an occupation which though lawful is subject to abuse and likely to become injurious to the community.

The following occupations have been judicially determined to be of this class: *Auctioneer*, Wright v. May, 127 Minn. 150, 149 N.W. 9, L. R. A. 1915B, 151; *pawnbroker*, Asakura v. Seattle, 122 Wash. 81, 210 Pac. 30, reversed in 265 U. S. 332, 68 L. Ed. 1041, 44 S. Ct. 515, upon the ground that the ordinance violated the treaty between the United States and Japan; *pool and billiard room operator*, Ohio ex rel. Clarke v. Deckebach, 274 U. S. 392; State ex rel. Balli v. Carrel, 99 Ohio St. 285, 124 N. E. 129; Anton v. Van Winkle, 297 Fed. 340; pilot, State v. Ames, 47 Wash. 328, 92 Pac. 137; *liquor dealer*, Trageser v. Gray, 73 Ed. 250, 9 L. R. A. 780, 25 Am. St. Rep. 587, 20 Atl. 905; Bloomfield v. State, 86 Ohio St. 253, 41 L. R. A. (N. S.) 726, 99 N. E. 309, Ann. Cas. 1913D 629; also, De Grazier v. Stephens, 101 Tex. 194, 105 S. W. 992, 16 L. R. A. (N.S.) 1033; *peddler*, Commonwealth v. Hana, 195 Mass. 262, 122 Am. St. Rep. 251, 11 L.R.A. (NS) 799, 81 N. E. 149; *Employee on public works*, Crane v. New York, 239 U.S. 195; *lawyer*, State v. Estes 130 Tex. 425; 109 S. W. (2d) 167; Hong Yen Chang, 84 Cal. 163, 24 Pac. 156; Templar v. State Examiners 131 Mich. 254, 100 Am. St. Rep. 610, 90 N. W. 1058; Re O'Neill, 90 N. Y. 584; *farmer-landholder*, Terrace v. Thompson, 263 U. S. 197, 68 L. Ed. 255, 263 S. Ct. 197; Porterfield v. Webb, 263 U. S. 225, 68 L. Ed. 278, 263 St. Ct. 223; Webb v. O'Brien, 263 U. S. 313, 68 L. Ed.

318, 263 S. Ct. 313; Frick v. Webb, 263 U. S. 326, 68 L. Ed. 323, 263 S. Ct. 326.

The appellant testified on the contempt hearing that increased political activity in the State of Texas was one of the objectives of his union and the C.I.O. (R. 43, 44). Organizers for any group whose objective it is to affect the political life of the State occupy a position which could easily be used to foment trouble in the community. "It is not unreasonable to suppose that the foreign born, whose allegiance is first to their own countries, and whose ideals of governmental environment and control have been engendered and formed under entirely different regimes and political systems, have not the same inspiration for the public weal, and are not as well disposed toward the United States as those who, by citizenship, are a part of the Government itself." 2 Am. Jur. Sec. 13 p. 470. The Legislature of Texas as evidenced by the Act in question obviously thought this was true and on this basis limited the business or profession of "labor organizer" to those who enjoy the privileges and responsibilities of citizenship. The Legislature found in the preamble of the Act that "because of the activities of labor unions affecting the economic conditions of the country and the State, entering as they do into practically every business and industrial enterprise, it is the sense of the Legislature that such organization affect the public interest and are charged with a public use." Section 1, Article 5154a, Vernon's Annotated Texas Civil Statutes. The appellant has not met and overcome the burden cast on him of showing that this

classification has no reasonable basis in fact and is arbitrary. *Terrace* v. *Thompson*, 263 U. S. 197, *Crane v. New York*, 239 U. S. 195, *Porterfield* v. *Webb*, 263 U. S. 225, *Ohio ex rel. Clarke* v. *Deckebach*, 274 U. S. 392, *Trageser* v. *Gray*, 73 Md. 250, 20 A. 905, 9 L. R. A. 780, 25 Am. St. Rep. 587, *Commonwealth* v. *Hana* (Mass.) 81 N. E. 149.

WHEREFORE, appellee prays that this appeal be dismissed or in the alternative that the judgment of the Supreme Court of Texas be affirmed.

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A copy of this brief has been mailed to Mr. Ernest Goodman, 3220 Barlum Tower, Detroit 26, Michigan; Messrs. Lee Pressman and Eugene Cotton, 718 Jackson Place, N.W. Washington, D. C.; and Messrs. Arthur J. Mandell and Herman Wright, Fifth Floor, State National Bank Building, Houston, Texas, Attorneys for R. J. Thomas, Appellant.